MIKE McGRATH
Montana Attorney General
BRIAN M. MORRIS
Solicitor
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549

COUNSEL FOR RESPONDENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

STATE ex rel. RICHARD DOLAN, individually and on behalf of himself, his minor children and others similarly situated, DENISE HAYMAN, individually and on behalf of herself, minor children and others similarly situated, and GREAT FALLS PUBLIC SCHOOL ELEMENTARY SCHOOL DISTRICT NO. 1 and HIGH SCHOOL DISTRICT NO. 1A, Plaintiffs, and STATE OF MONTANA, Intervenor/Plaintiff, v. PPL MONTANA, LLC, a Delaware Limited Liability Corporation; PPL SERVICES CORP., a Delaware Corporation; AVISTA CORPORATION, a Washington Corporation, PACIFICORP, an Oregon Corporation; and JOHN DOES 2 through 10, Defendants.	Cause No. CV-03-167-M-DWM **BRIEF IN SUPPORT OF STATE OF MONTANA'S MOTION TO INTERVENE**

The State of Montana (hereinafter "Montana") seeks to intervene as a party-plaintiff in this action. As explained below, Montana satisfies the standard both for intervention as of right under Fed. R. Civ. P. 24(a), and for permissive intervention under Fed. R. Civ. P. 24(b).

BACKGROUND

Plaintiffs Richard Dolan, individually and on behalf of himself, his minor children and others similarly situated, Denise Hayman, individually and on behalf of herself, her minor children and others similarly situated, Great Falls Public School Elementary School District No. 1 and High School District No. 1A (hereinafter collectively "Plaintiffs"), filed a Complaint on October 17, 2003, and an Amended Complaint on January 19, 2004. Both the Complaint and the Amended Complaint seek a declaratory judgment, compensatory damages, and attorneys' fees for the Defendants' use of State lands/school trust lands without compensation to Montana as required by law, and to require Defendants to compensate Montana for the full market value of the interest in State lands/school trust lands used and occupied by the Defendants.

Defendants PPL Montana LLC and PPL Services Corp. filed a joint answer and affirmative defenses to the Amended Complaint on February 2, 2004. Defendants Avista Corporation and PacifiCorp have not yet filed answers to the Complaint and Amended Complaint. Instead, these Defendants filed separate motions to dismiss on February 2, 2004. Defendant Avista Corporation claims in its motion that the lands at issue do not qualify as school trust lands and therefore no compensation is due. Alternatively, Defendant Avista Corporation claims that the Federal Power Act, 16 U.S.C. §§ 791-828c,

preempts any Montana law requiring compensation for their use of these lands. Defendant PacifiCorp claims in its motion to dismiss that Montana represents an indispensable party, pursuant to Fed. R. Civ. P. 19, and that the Plaintiffs' failure to name Montana as a defendant in this matter warrants dismissal. Further, Defendant PacifiCorp alleges that joinder of Montana as a defendant would defeat diversity and thereby deprive the Court of jurisdiction over this matter. Defendants PPL Montana LLC and PPL Services Corp. joined in the motions to dismiss filed by Avista Corporation and PacifiCorp on February 5, 2004.

ARGUMENT

Rule 24 should be "construed broadly" in favor of an applicant seeking to intervene in an action. Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995) (citations omitted). Montana clearly satisfies all criteria to intervene as a matter of right as a party plaintiff and the equities also heavily support Montana's permissive intervention.

I. MONTANA IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Federal Rule Civil Procedure 24(a) permits a party to intervene as of right. To intervene in this matter as of right, Montana's application must meet the following four criteria: (1) it must be timely; (2) it must show an interest in the subject matter: (3) it must show that protection of its interest may be impaired by disposition of this action; and (4) it must show that its interest is not adequately represented by the existing parties. Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1107-08 (9th Cir. 2002);

Sagebrush Rebellion, Inc. v. Watts, 713 F.2d 525, 527 (9th Cir. 1983). The Court must grant a motion to intervene, pursuant to Rule 24(a)(2), "if [the] four criteria are met." United States v. State of Washington, 86 F.3d 1499, 1503 (9th Cir. 1996) (citation omitted). In considering Montana's application, the Court should construe the terms of Rule 24 "broadly in favor of the applicants." Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995).

A. Montana's Motion to Intervene is Timely.

Generally the Court should evaluate three factors to determine whether a motion to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." Id. (citation omitted). The timeliness of Montana's motion for intervention must be determined from the particular circumstances surrounding the case and this decision falls within the sound discretion of the Court. NAACP v. New York, 413 U.S. 345, 366 (1973). The particular circumstances of this case weigh strongly in favor of allowing Montana to intervene.

Although the Plaintiffs filed the Complaint and Amended Complaint several months before Montana filed this application, only Defendants PPL Montana LLC and PPL Services Corp. have answered the Amended Complaint. Neither of these Defendants has yet propounded discovery and no status or scheduling conference has been held. Defendants Avista Corporation and PacifiCorp, of course, filed motions to dismiss this action and neither of these Defendants has propounded discovery. Montana's application obviously is timely and none of the Defendants can claim prejudice from the timing of Montana's application. Cf. County of Orange v.

Air California, 799 F.2d 535, 538 (9th Cir. 1986) (holding that a motion to intervene filed after the parties had come to an agreement following five years of litigation should weigh heavily against intervention).

B. Montan Possesses a Direct, Substantial, and Legally Protectable Interest in the Subject of this Action.

Rule 24(a) requires an applicant for intervention to show a "direct, substantial, legally protectable interest" relating to the property or transaction that is the subject matter of the litigation. An applicant has a "protectable interest" in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998) (internal quotation marks omitted)). An applicant satisfies the relationship requirement "if the resolution of the plaintiff's claims actually will affect the applicant." Donnelly, 159 F.3d at 410.

Courts do not apply a rigid standard under this "interest test," because it is not a clear-cut or bright-line rule, as "no specific legal or equitable interest need be established." Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993). Instead, the Court should view the "interest test" as a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) (internal quotation marks and citation omitted). Montana need not have a specific legal or equitable interest in jeopardy; instead it need show only a "protectable interest of sufficient magnitude to warrant inclusion in this action." Smith v. Pangilinan, 651 F.2d 1320, 1324 (9th Cir. 1981).

Montana owns the lands in question. The only dispute appears to be whether the lands simply are State lands or whether the lands at issue constitute school trust lands. Regardless of the distinction, as noted by Defendant PacifiCorp, "the State has a fundamental interest in this litigation because the lands at stake are **state lands**." (Br. Supp. PacifiCorp's Mot. Dismiss at 6 (emphasis in original).) This admission by Defendant PacifiCorp confirms Montana's interest in the lands at issue and supports Montana's intervention as a party plaintiff.

C. Montana's Interests May be Impaired as a Result of This Litigation.

Rule 24(a)(2) requires that an applicant for intervention as a matter of right be "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." Montana, according to Defendant PacifiCorp, "cannot possibly protect, advance or even explain its interest in the administration and use of its own land if it is not a party to this action." (Br. Supp. PacifiCorp's Mot. Dismiss at 6.) Once again, this admission highlights the fact that Montana's interest may be impaired as a result of this litigation.

Moreover, judicial estoppel precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. Rissetto v. Plumbers & Steamers Local 343, 94 F.3d 597, 600-01 (9th Cir. 1996); Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). Defendant PacifiCorp expressly asserted in its motion to dismiss that Montana represented an indispensable party pursuant to Fed. R. Civ. P. 19. Defendant PPL Montana LLC and PPL Services Corp. expressly concurred in this claim. (See Defendant PPL Montana

LLC's Joinder in Motions to Dismiss of Defendant Avista Corporation and PacifiCorp.) Accordingly, these Defendants should be judicially estopped from objecting to Montana's intervention in this matter as a party plaintiff.

The United States Supreme Court recently listed three factors that the Court should consider in determining whether to apply the doctrine of judicial estoppel:

> (1) a party's later position must be "clearly inconsistent" with its earlier position; (2) whether the court accepted that party's earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001). The majority of these factors exist here.

Defendants PacifiCorp and PPL Montana LLC clearly would be asserting inconsistent positions if they now object to Montana intervening in this action. These parties explicitly argued that Montana represented an indispensable party to this action and that Montana "cannot possibly protect, advance or even explain its interest in the administration and use of its own land if it is not a party to this action." (Br. Supp. PacifiCorp's Mot. Dismiss at 6.)

More importantly, although the Court has yet to rule on the Defendants' indispensable party claim, the Court should reject any attempt by the Defendants to flip-flop based on the "general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings," and to "protect against a litigant playing fast and loose with the courts." Russell, supra, 893 F.2d at 1037 (applying judicial estoppel to prevent the state from advancing a procedural argument in federal court that

was contrary to the arguments it previously advanced in that court). Defendants argued that Montana represented an indispensable party to this litigation and Montana now stands prepared to undertake its proper role as a party in this matter.

D. Montana Interests May Not be Adequately Represented.

The final prong of Rule 24(a)(2) requires the applicant seeking to intervene to demonstrate that its interests may not be adequately represented by the parties. This prong is satisfied, however, "if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972); see also Sagebrush Rebellion, 713 F.2d at 528.

Montana must represent the broader interests of the general public, rather than only the specific interests of the Plaintiffs. The Court in Trbovich, 404 U.S. at 538-39, allowed intervention where the government's duty to represent both the broad interest of the public and the narrow interests of the applicant were "related, but not identical" to the applicant's. See also Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1499 (9th Cir. 1995) (allowing intervention of timber industry applicants where government must represent "broad public interest, not just economic concerns of the timber industry"). The potential divergence of interest between Montana and the Plaintiffs regarding the exact nature of the lands at issue and the appropriate compensation due for the Defendants' continued use of these lands satisfies the "minimal" burden required. Trbovich, 404 U.S. at 538 n.10.

II. IN THE ALTERNATIVE, MONTANA SHOULD BE ALLOWED PERMISSIVE INTERVENTION.

If the Court denies Montana's motion to intervene as of right, Montana still should be allowed to intervene. Rule 24(b) provides for permissive intervention at the Court's discretion where an applicant's claim possesses questions of law or fact in common with the existing action. In determining whether to grant permissive intervention, the Court must consider the nature and extent of the intervenor's interest. In particular, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties

All of these factors point toward Montana's intervention. The timeliness of Montana's motion provides no prejudice to the parties and would not unduly delay the course of the litigation. The Court has yet to rule on the Defendants' motions to dismiss and has not even set a date for a hearing on those motions. More importantly, Montana's significant legal issues at stake in this case strongly support its intervention. Whether the lands at issue are simply State lands or constitute school trust lands, Montana owns them and this litigation goes to the heart of Montana's ownership and control of these lands.

CONCLUSION

For the foregoing reasons, Montana respectfully requests that the Court grant its motion to intervene as a party plaintiff in this matter.

Respectfully submitted this 7th day of May, 2004.

MIKE McGRATH
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By:_____
BRIAN M. MORRIS
Solicitor

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing State of Montana's Brief in Support of Motion to Intervene to be mailed to:

Mr. Robert L. Sterup
Ms. Kyle Anne Gray
Holland & Hart LLP
P.O. Box 639
Billings, MT 59103-0639

Mr. Robert E. Sheridan
Mr. Stephen R. Brown
Garlington, Lohn & Robinson PLLP
P.O. Box 7909
Missoula, MT 59807

Mr. Douglas J. Wold
Wold Law Firm
P.O. Box 400
Polson, MT 59860

Mr. R. Blair Strong
Paine Hamblein Coffin Brooke & Miller, LLP
717 West Sprague Avenue, Suite 1200,
Spokane, WA 99201-3505

Mr. Robert Aldisert
Mr. Paul Fortino
Ms. Bethany Graham
Perkins Coie LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4129

Ms. Elizabeth Thomas
Preston Gates & Ellis
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158

DATED:_____ _____
Brian M. Morris